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Chapter 22: Land Use Law

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CHAPTER 22

Land Use Law

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§22.1. Zoning plans: Adoption: Special zoning boards and curative statutes. G.L., c. 40A, §6 prescribes certain procedures which must be followed by a municipality to enact or amend a zoning plan. Specifically, it requires a hearing, subject to special notice requirements, to be held before the planning board, the municipal governing body, or a special zoning board appointed by the governing body. The governing body is the board of selectmen or the city council. However, in 1936, the town of Canton formed a special zoning board by vote of the *town meeting.* The following year the special board proposed a zoning plan, and the plan was adopted at the 1937 town meeting. Thirty-one years later, in *Town of Canton v. Bruno,*[1] the town sought to enjoin the defendants' use of a sand and gravel pit which had been operated intermittently in a residential area since before the town's first zoning by-law in 1937. Whether the defendants could successfully maintain a claim to a pre-existing use depended upon the validity of the 1937 by-law and the effect of subsequent curative legislation.

Interpreting the language of Section 6,[2] the Court agreed with defendant that the special Canton zoning board was not constituted in accordance with statutory requirements. The statute plainly requires strict adherence, and the town's "substantial compliance" with its provisions did not meet that standard. Accordingly, the Court ruled that the town had no jurisdiction to adopt the by-law in 1937.

However, in 1949 the General Court adopted a curative statute to validate the 1936 plan.[3] Several factors suggested that the curative statute was intended to apply retroactively and, hence, to validate the original Canton zoning plan *ab initio.*[4] Therefore, the Court granted the town's prayer for injunctive relief.

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§22.1. [1] 1972 Mass. Adv. Sh. 791, 282 N.E.2d 87.

[2] The adoption of zoning by-laws in 1937 was governed by then G.L., c. 40, §27, since recodified as G.L., c. 40A, §6 by Acts of 1968, c. 194.

[3] Acts of 1949, c. 178, §1 purported to validate the zoning by-laws adopted by the town of Canton in 1937.

[4] The Court indicated that a curative statute, by its very nature, is designed to rectify defects arising prior to its enactment. Moreover, in this particular case, the retroactive thrust of he 1949 enactment was underlined by the fact that, if the intent was merely to have a *prospective* effect, that end could have been achieved by simple readoption of the by-law by the town.

Although the effect of a curative statute upon actions taken prior to its enactment appeared to be a minor issue in *Bruno,* the Court's extensive discussion of the effect of such statutes has important implications. While the legislature has broad authority to cure certain defects in municipal by-laws, there are constitutional limits to its power:

> The Legislature may confirm and validate the action of a town which is void by reason of some irregularity or failure to comply with the law if the Legislature could have originally authorized the action, provided that vested rights are not impaired by the curative legislation. . . . A validating act is constitutionally defective, however, to the extent that it impairs the vested rights of property owners.[5] (Citations omitted).

Since property interests are profoundly affected by land use law, it is important to preserve public confidence in municipal zoning enactments. Zoning by-laws, like other municipal and legislative enactments, are therefore accorded a presumption of validity. Inasmuch as the Canton by-law had passed muster before the Attorney General[6] and had remained unchallenged since 1937 the Court held that "it had at least prima facie validity in 1945, when defendants' predecessor in title reopened the gravel pit [the use of] which had been discontinued in 1936."[7] Thus, defendants' predecessor in title had no reason to assume that he could validly reopen the gravel pit at the time he bought the property, and the nonconforming uses exception could therefore not apply. The Court posited a rule to govern the interrelationship of nonconforming uses, invalid zoning plans and curative legislation:

> We hold that, in the absence of substantial equity, the use of land in violation of a zoning by-law or ordinance does not create a substantive right on the basis of a nonconforming use if the zoning by-law or ordinance is subsequently adjudicated to be invalid because of a defect in the process of adoption. Nor does subsequent legislation which cures retroactively such a defect in the adoption of a zoning by-law or ordinance make a use of the land which was in violation of the zoning by-law or ordinance, prior to validation, a protected nonconforming use.[8]

§22.2. Zoning regulations: Amendment: Timing and content of notice. The exacting requirements for adoption for zoning by-laws and ordinances have been noted above.[1] Similarly detailed procedures are

5 1972 Mass. Adv. Sh. at 799-800, 282 N.E.2d at 93-94.

6 Pursuant to G.L., c. 40, §32, town by-laws must be approved by the attorney general before they take effect.

7 1972 Mass. Adv. Sh. at 801, 282 N.E.2d at 94.

8 Id. at 1170, 284 N.E.2d at 613.

§22.2. 1 See §22.1, *supra.*

set out for the valid enactment of amendatory legislation.[2] These requirements express the strong public policy that the community should carefully scrutinize any limitations on land use.

One of the provisions designed to insure community participation in this process is the notice requirement contained in Section 6 of the Zoning Enabling Act. If an amendment to a zoning ordinance or by-law is proposed, notice of the requisite hearings before the planning board and the city council or committee involved must be published at least fourteen days before the hearing and "once in each of two successive weeks."[3] In *Crall v. City of Leominster*,[4] the Supreme Judicial Court was asked to determine the precise meaning of that requirement. The planning board notice was published on Saturday and the following Monday, and notice of the city council hearing was published on Thursday and the following Monday. The plaintiff claimed that the notices were not in "two successive weeks" because the publication intervals were only two days and four days respectively. Since the phrase is not defined by the Zoning Enabling Act or by other legislation,[5] the Court chose to construe it according to common understanding as two "calendar" weeks. On this basis both notices were held to be valid.[6]

The Court also rejected the claim that the notices did not specify "the subject matter, sufficient for identification," as also required by section 6.[7] The notices for the hearing before the city council clearly complied, since they gave a detailed description of the locus. And, although the notices for the hearing before the planning board were fragmentary at best, they did refer to a "more fully described plan on file in the Planning Board office"[8] and that was held sufficient. The Court emphasized that notice of a hearing before a planning board is not all that important since such a hearing is preliminary and advisory only, and a further opportunity to be heard would be available before the city council.

Although scrupulously technical adherence to a procedure seems unnecessary when substantial injustice will not result from a slight deviation, some questions arise from the Court's rather casual treatment of the issue of the description of the locus. For example, the Court's decision in *Town of Canton v. Bruno*[9] would seem to be at odds with the proposition that the planning board hearing has little meaning. And if the description requires a trip to examine the planning board's files, one may question why the legislature expressly required a description "suffi-

2 G.L., c. 40A, §6.
3 Id.
4 1972 Mass. Adv. Sh. 1167, 284 N.E.2d 610.
5 G.L., c. 4, §7, cl. Nineteenth, defines "month" and "year" but does not define "week."
6 1972 Mass. Adv. Sh. at 1170, 284 N.E.2d at 613.
7 Id. at 1168, 284 N.E.2d at 612.
8 Id. at 1170, 284 N.E.2d at 613.
9 1972 Mass. Adv. Sh. 791, 282 N.E.2d 87, noted in §22.1., *supra*.

cient for identification" to be contained in the notice. It may well be that the enabling act is itself somewhat redundant in requiring two hearings;[10] but if so, the proper remedy is for the legislature to provide.

In *Hallenborg v. Town Clerk*,[11] the Supreme Judicial Court was confronted with yet another aspect of the notice requirements in Section 6. There was no question that the statutory notice requirement of fourteen days had not been met in this case. Rather, the issue presented was whether the zoning amendment was valid in spite of the notice irregularities.

The town of Billerica had, in its by-laws, specified only that the notices be published within a ten-day period before the planning board hearing and, in 1969, notice of such a hearing was first published thirteen rather than fourteen days prior to a hearing on the zoning amendment contested in *Hallenborg*. Nonetheless, the hearing before the planning board was "well attended" and no opposition to the amendment (which permitted the construction of apartments) was registered. The amendment was then adopted at the annual town meeting upon the recommendation of the planning board. The plaintiff residents and taxpayers of the town claimed that the defective notice of the planning board meeting rendered the amendment invalid. Accordingly they filed for a writ of mandamus to compel the town clerk to enforce the by-law as it had existed prior to the amendment. By the time this action was brought, substantial progress had already been made in the construction of several of the apartment developments which were authorized by the contested zoning amendment. The lower court dismissed the writ and this appeal was taken.

The Supreme Judicial Court reviewed the purpose of the hearing before the planning board and concurred with the lower court which had distinguished the critical nature of notice before a board of appeals' decision on a variance or special permit case from the non-critical nature of notice before the planning board hearing considering whether to recommend a proposed zoning by-law amendment. In the former case, notice is especially important because the hearing is essentially adjudicative. In the latter case, the purpose of the hearing is simply to permit the public to express views prior to the planning board's recommendation to the legislative body of the community. This purpose was substantially met despite the error of one day in the notice. The Court agreed that this type of notice was, in a jurisdictional sense, directory and not mandatory. The error was not intentional and the Court adopted the rule of the cases decided before the 1954 passage of the Zoning Enabling Act, that failure of notice was critical only upon a showing of sub-

[10] See Woods v. City of Newton, 351 Mass. 98, 217 N.E.2d 728 (1966) in which the Court upheld single hearings before both the planning board and board of aldermen, since both sat separately, if in the same room, and heard the same evidence from the public there present.

[11] 1971 Mass. Adv. Sh. 1681, 275 N.E.2d 525.

stantial prejudice.[12] It did recognize that the pre-1954 rule might not be controlling in the face of express notice provisions to the contrary in the Zoning Enabling Act. But considering equitable principles of fairness, the Court still found the notice provisions not absolutely mandatory in the present case.

The Court, however, refused to sustain the lower court's dismissal of the petition for a writ of mandamus. Although the plaintiffs had not been prejudiced by the notice defect, the fact remained that the zoning amendment had been adopted in contravention of the Zoning Enabling Act. The petitioners were asserting a "public right" to have the law enforced.[13] While the writ of mandamus could technically have issued, the Court chose to delay any further action until the town could validate the amendment by properly re-adopting it. Nine months were given to permit this validating action. The Court finally noted that, if the writ should later issue, the equitable principles which tended to validate the amendment should be considered in any enforcement proceedings.

This case would be simpler if the Court had simply stated an absolute rule—that failure to give adequate notice in this case either was sufficient to invalidate the amendment or was not. But the analysis actually followed is a sophisticated one, well designed to assure justice among the many interests represented, even if it provides a rather uncertain guide for future cases. Clearly, however, the Court is unwilling to suggest that even this type of notice provision can be violated with impunity; and it remains imperative for developers to comply with the notice provisions and to withhold investments until assured of proper compliance.

§22.3. Denial of building permit: Proposed amendment as basis. In *Ouellette v. Building Inspector of Quincy*[1] the Supreme Judicial Court was asked to reverse the denial of a building permit based upon a proposed amendment to the Quincy zoning ordinance. In September of 1967 the petitioner had applied for a building permit to construct a 53-

[12] See Lexington v. Bean, 272 Mass. 547, 550-51, 172 N.E. 867, 869 (1930); Burlington v. Dunn, 318 Mass. 216, 217-19, 61 N.E.2d 243, 244 (1945).

[13] The Court cited Brady v. Board of Appeals, 348 Mass. 515, 204 N.E.2d 513 (1965). There the plaintiff sought to reverse the granting of a special permit on land adjacent to her property. The Court stated that although "[f]ailure to take an appeal within the prescribed period from the granting or denial of a permit is a bar to a direct review of the action in respect of the permit . . . [Such] loss by an aggrieved citizen of the right of direct attack on a permit does not entail the loss of the right of the same citizen to bring a mandamus petition for enforcement of the law and to stop violations in the construction going forward under the permit.

"We hold that . . . the aggrieved abutter, by failure . . . to appeal . . . did not lose the right, which until then she had had along with other citizens and which other citizens continued to enjoy, to invoke by mandamus the public right to have the law immediately enforced. Resorting to mandamus showed an intent to seek enforcement of that right rather than the reversal of a decision of the building inspector." 348 Mass. at 520-22, 204 N.E.2d at 517.

§22.3. [1] 1972 Mass. Adv. Sh. 1369, 285 N.E.2d 423.

unit apartment building. At that time the land was zoned for the proposed use; however in June of 1968 the city council amended the zoning ordinance to prohibit apartment buildings in the district in which the petitioner's land was located. Consequently the respondent building inspector denied the petitioner's application. Then, in December of 1970 the Supreme Judicial Court affirmed a Land Court decision that invalidated the 1968 zoning amendment for failure to comply with statutory procedures.[2] The petitioner resubmitted his application for a building permit, but the building inspector again refused to grant the permit because the city council had ordered him not to consider the request until after the proper adoption of the previously invalidated zoning amendment. The petitioner then obtained a writ of mandamus in the superior court directing the building inspector to issue a permit.

On appeal the Court first held that mandamus was the proper remedy, rejecting the respondent's argument that an adequate administrative remedy was available. G.L., c. 40A, §13 provides that "[a]n appeal to the board of appeals . . . may be taken by any person aggrieved by reason of his inability to obtain a permit from any administrative official *under the provisions of this chapter.*" (Emphasis added). But the Court interpreted this section to allow an administrative appeal only when the denial of a permit is based upon "the provisions of this chapter." Since in the present case the inspector refused the permit "on account of improper interference with his duties by other municipal officials,"[3] the Court reasoned that such an appeal would be futile, and thus not required.[4]

Turning to the merits, the Court noted that the city council did not have the authority to direct the building inspector to refuse the permit. However, the respondent argued that the action of the building inspector should nevertheless be affirmed on the rationale of *Doliner v. Planning Board of Millis*.[5] In that case the Court held that a planning board could properly reject a plan as inconsistent with a *newly adopted* zoning amendment, although it had not yet been *approved* by the Attorney General.[6] The Court rejected the analogy, distinguishing between the *proposed* zoning amendment in the case at bar and the *adopted* but not yet finally approved and published amendment in the *Doliner* case.[7] Furthermore G.L., c. 40A, §12, empowers a building inspector to withhold a permit only for violations of "any zoning ordinance or by-law or

2 Trumper v. City of Quincy, 1970 Mass. Adv. Sh. 1455, 264 N.E.2d 689.

3 1972 Mass. Adv. Sh. 1369, 1373, 285 N.E.2d 423, 426.

4 Id. at 1373-74, 285 N.E.2d at 426. For other discussions on the propriety of mandamus, see §§16.10 and 20.5, *supra*.

5 343 Mass. 1, 175 N.E.2d 919 (1961).

6 Attorney General approval of town by-laws is governed by G.L., c. 40, §32. For an analysis of this power, see §16.10, *supra*.

7 The Court noted that a proposed amendment could be changed before adoption, while an adopted by-law is rarely disapproved by the Attorney General. 1972 Mass. Adv. Sh. 1369, 1375-76, 285 N.E.2d 423, 428.

amendment thereof," and not for violations of a proposed amendment. Accordingly, the Court held that the building inspector could not refuse to issue a building permit because the building would violate proposed zoning amendments.[8]

The *Ouellette* case graphically illustrates the confrontation that often occurs between a community and a developer. In the future a community will be unable to rely upon the mere prospect of a zoning change to block a proposed project. The rule of the *Doliner* case now emerges as a narrow exception, depending in large part upon the very limited review authority of the Attorney General. Thus if a permit is to be denied it will have to be refused under the authority of presently adopted law.

§22.4. Zoning regulation coverage: Provisions for sewage facilities. Four years ago in *Enos v. City of Brockton,*[1] the Supreme Judicial Court ruled that a zoning provision requiring all multiple dwellings to be of "second class construction" was not authorized under the Zoning Enabling Act.[2] The definition of "second class construction" was not stated in the zoning ordinance but rather in the city's building code. Since zoning laws and building codes are designed to serve divergent purposes, the Court concluded that they could not be combined.

The *Enos* decision created considerable uncertainty as to the judicial limitations which might be imposed upon broadly drafted zoning bylaws. After *Enos,* it seemed clear that a building code regulation could not be enforced under the guise of a zoning ordinance. It was unclear, however, whether the Court intended *Enos* to be interpreted as a narrow limitation confined to the interaction between zoning and building regulation or as a signal that zoning ordinances embodying other types of regulations not clearly within the traditional ambit of zoning would also be struck down.

The question of the scope of the *Enos* decision has been largely resolved by the Supreme Judicial Court decision in *Decoulos v. City of Peabody.*[3] Peabody had a zoning ordinance that permitted certain commercial uses on the locus in question, "provided, however, that no such use . . . be permitted unless the sewage disposal for said lot is connected to the municipal sanitary sewer system." The locus was not served by such a system and an extension would have been required before the system could service the lot. The owner sought declaratory relief, seeking to have the provision declared invalid but the lower court sustained the ordinance.

The Supreme Judicial Court affirmed, noting that the ordinance increased rather than relaxed the standards imposed by state statutes and

[8] Id. at 1374-76 285 N.E.2d at 427-29.

§22.4. [1] 354 Mass. 278, 236 N.E.2d 919 (1968), noted in 1968 Ann. Surv. Mass. Law §12.4.

[2] G.L., c. 40A.

[3] 1971 Mass. Adv. Sh. 1593, 274 N.E.2d 816.

the State Sanitary Code.[4] Thus the case did not involve a conflict with overriding state policy, but solely the issue of whether the state sanitary or public health laws preclude "a city from including more specific and stringent health protection measures adopted pursuant to G.L., c. 40A."[5] The Court found the regulation to be well within the type of public health and welfare purposes of the Zoning Enabling Act. This decision clearly suggests that the Zoning Enabling Act will not be narrowly construed, especially in light of the broad purposes enumerated in Sections 2 and 3 of G.L., c. 40A.[6]

In discussing *Enos v. City of Brockton,* the Court stated: "We regard the *Enos* case as limited in application to provisions uniquely appropriate to building codes."[7] Indeed, in a footnote to the opinion, the Court intimated that *Enos* was a very narrow decision which ought to be confined to its facts.[8] The footnote dealt with the plaintiff's challenge of another zoning ordinance, one which required that all structures in a particular zone have an outer wall of generally consistent external appearances and of fireproof or fire-resistant materials. The Court stated: "We note merely that [the relevant regulation] . . . did not as directly concern the details of all aspects of construction as did the provision considered in the *Enos* case, which incorporated by reference a provision of the building code." The Court did not rule on the validity of the regulation since that issue was not contested. Nevertheless the opinion at least hints that even some kinds of building provisions might be valid as long as they do not directly derive from or conflict with a building code regulation.

§22.5. Flood plain zoning. *Turnpike Realty Co. v. Town of Dedham*[1] involved a major attack against a flood plain zoning provision of Dedham's zoning by-law. Petitioner had acquired land in Dedham, on the bank of the Charles River, in 1947. The land consisted primarily of low, swampy area, but included two knolls, one of 3.2 acres and the other of 0.2 acres. Petitioner intended to develop the land for residential use, and the land was originally zoned for that purpose. However in 1963 the Town of Dedham amended its zoning by-law to include most of petitioner's land, including the knolls, in a Flood Plain District. This greatly reduced the potential uses of the land,[2] and effectively precluded

4 G.L., c. 111, §127A; State Sanitary Code §§2.9-6.9 (1966 ed.). See also G.L., c. 83, §§3, 11.

5 1971 Mass. Adv. Sh. at 1594, 274 N.E.2d at 817.

6 The Court noted the health and welfare aspect of Section 2 as it related to the use of buildings, structures and land, and the conservation of health, provision for sewerage, and preservation of amenities set out in Section 3.

7 1972 Mass. Adv. Sh. at 1596, 274 N.E.2d at 818.

8 1972 Mass. Adv. Sh. at 1593 n.1, 274 N.E.2d at 817 n.1.

§22.5. 1 1972 Mass. Adv. Sh. 1303, 284 N.E.2d 891.

2 The amendment provided that " '[w]ithin a Flood Plain District no structure or building shall be erected, altered or used, and no premises shall be used except for one or more of the following uses: Any woodland, grassland, wetland,

its development for residential purposes.[3] The petitioner attacked the validity of the zoning amendment in the Land Court,[4] but the judge ruled that the amendment was valid and fully applicable to the petitioner's land. On appeal the petitioner raised nine separate issues for resolution by the Supreme Judicial Court. Because of the novel problems created by flood plain zoning, and because the case presents the Court's first detailed discussion of such zoning, these issues will be discussed in detail. For simplicity, the issues to be discussed will be grouped under two headings: (a) the validity of the by-law, and (b) the applicability of the by-law to petitioner's land.

Validity of the by-law. Petitioner first claimed that the enactment of Dedham's flood plain zoning provisions was beyond the authority granted in Chapter 40A, the Zoning Enabling Act. Section 2 of that Chapter provides that "[a] zoning by-law may provide that lands deemed subject to seasonal or periodic flooding shall not be used for residence or other purposes *in such a manner as to endanger the health or safety of the occupants thereof.*"[5] (Emphasis added). Since Dedham's Flood Plain District contained unoccupied land, he argued, the by-law was not within the powers granted by the quoted sentence of Section 2. However, the Court held that this sentence in no way limits the authority of a municipality to enact a flood plain zoning by-law. The municipality could have enacted the challenged by-law under the general grant of authority in G.L., c. 40A, §§2, 3, since the intent behind the by-law was in keeping with the promotion of the public health, safety and welfare.[6] The purpose of the by-law was specified in its preamble,[7] and the

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agricultural, horticultural, or recreational use of land or water not requiring filling. Buildings and sheds accessory to any of the Flood Plain uses are permitted on approval of the Board of Appeals. . . . [A]ny such building or structure shall be designed, placed, and constructed to offer a minimum obstruction to the flow of water; and . . . it shall be firmly anchored to prevent floating away.' " Id. at 1304, 284 N.E.2d at 894.

3 The by-law allowed variances from permitted uses only in very restricted circumstances: " 'If any land in the Flood Plain District is proven to the satisfaction of the Board of Appeals after the question has been referred to the Planning Board, the Board of Health, and the Board of Selectmen, and reported on by all three Boards or the lapse of thirty days from the date of referral without a report, as being in fact not subject to flooding or not unsuitable because of drainage conditions for any use which would otherwise be permitted if such land were not, by operation of this section, in the Flood Plain district, *and* that the use of such land for any such use will not interfere with the general purposes for which Flood Plain district have been established, and will not be detrimental to the public health, safety, or Welfare, the Board of Appeals may, after a public hearing with due notice, issue a permit for any such use.' " (Emphasis added). Id.

4 Suit was brought pursuant to G.L., c. 185, §1(j ½) and G.L., c. 240, §14A.

5 This sentence was added to Section 2 by Acts of 1954, c. 368, §2.

6 1972 Mass. Adv. Sh. at 1307-08, 284 N.E.2d at 896. The same reasoning was used to reject petitioner's contention that the by-law was an unconstitutional exercise of Dedham's police power: "The general necessity of flood plain zoning

Court found it to be consistent with the generally accepted objectives of flood plain zoning.[8] Further, the fact that "aesthetic considerations" were included in the preamble was not fatal. Although such considerations may not alone be used to justify restrictions on the use of property,[9] they do not invalidate an otherwise valid restriction.[10]

The petitioner also attacked several provisions of the by-law as unduly vague and ambiguous. Under the by-law special permits for other than "flood plain" uses may be granted if certain conditions are proven to exist "to the satisfaction of the Board of Appeals."[11] Petitioner argued that the by-law provided no standards to measure the Board's "satisfaction," and that the exercise of the special permit power could thus be arbitrary and capricious.

While the Court agreed that in delegating authority to a board, adequate standards must be set, it also noted that " '[t]he standards need not be of such a detailed nature that they eliminate entirely the element of discretion from the board's decision.' "[12] In the present case, the Court found that the standards set forth in both the Zoning Enabling Act and the zoning by-law were adequate to guide the board in its actions. "The board must find that the land is not subject to flooding or not unsuitable because of drainage conditions for a particular use; and that such use

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to reduce the damage to life and property caused by flooding is unquestionable." Id. at 1312, 284 N.E.2d at 899.

7 " 'The purpose of the Flood Plain District is to preserve and maintain the ground water table; to protect the public health and safety, persons and public health and safety, persons and property against the hazards of flood water inundation; for the protection of the community against the costs which may be incurred when unsuitable development occurs in swamps, marshes, along water courses, or in areas subject to floods; and to conserve natural conditions, wild life, and open spaces for the education, recreation and general welfare of the public.' " Id. at 1304, 284 N.E.2d at 894.

8 Such objectives are: "(1) the protection of individuals who might choose, despite the flood dangers, to develop or occupy land on a flood plain; (2) the protection of other landowners from damages resulting from the development of a flood plain and the consequent obstruction of the flood flow; (3) the protection of the entire community from individual choices of land use which require subsequent public expenditures for public works and disaster relief." Id. at 1308, 284 N.E.2d at 896, citing Dunham, Flood Control Via the Police Power, 107 U. of Pa. L. Rev. 1098, 1110-17 (1959).

9 Barney and Carey Co. v. Milton, 324 Mass. 440, 87 N.E. 2d 9, 14 (1949).

10 1972 Mass. Adv. Sh. at 1308-09, 284 N.E.2d at 896. The petitioner also argued that the by-law was invalid because the motives of the Dedham conservation commission, a prime supporter of the by-law, were purely aesthetic. Since the purposes of the by-law were listed in its preamble, the Court deemed the motives of its supporters to be irrelevant. Id. at 1306, 284 N.E.2d at 895.

11 See note 3, *supra,* for the text of the special permit provision of the by-law.

12 1972 Mass. Adv. Sh. at 1311, 284 N.E.2d at 898, quoting MacGibbon v. Bd. of Appeals of Duxbury, 356 Mass. 635, 638, 255 N.E.2d 347, 350 (1970). The MacGibbon case is noted in 1971 Ann. Surv. Mass. Law §17.3.

will not interfere with the general purposes of the flood plain district, and will not be detrimental to the 'public health, safety, or welfare.' "[13]

Petitioner's final attack against the by-law was that the special permit procedure was of no value, since any permit issued under it would not be in keeping with the general purpose to protect persons and property against the danger of flooding. The Court rejected this argument. The provision in no way frustrates the general purpose of the by-law, since it conditions the issuance of the permit on a showing that land granted a permit is not subject to flooding or drainage difficulties.[14] Further, the Court questioned the relevance of the argument: "The possibility that a special permit granted to a landowner would be contested in court and annulled does not render the by-law invalid."[15]

Applicability of the by-law to petitioner's land. The petitioner claimed that, even if the by-law itself was valid, it could not validly be applied to his land. Two arguments were based on the wording of G.L., c. 40A, §2.[16] Petitioner first argued that the use of the word "flooding" referred only to flooding from natural causes. Since his land became flooded only when a flood control gate on the Charles River was "mismanaged," his land could not be included in the Flood Control District. The Court rejected this contention, commenting that the evidence "in no way" suggested that the flood control gate had been operated "unreasonably."[17] Petitioner further claimed that Section 5 requires a locality to specifically find that all land included in a Flood Plain District is in fact subject to seasonal or periodic flooding. This allegedly followed from the contention "that flood plain zoning is a radical departure from ordinary zoning concepts, and that the Legislature intended that a narrower standard of validity be used."[18] Here the Court merely referred to its earlier holding that Section 2 does not limit the power of municipalities to utilize zoning techniques to control flooding.[19] Since general standards for the validity of zoning enactments were thus to be applied, the town had acted properly in implicitly deeming petitioner's land to be subject to periodic flooding.[20]

Relative to his argument that the by-law itself was an unconstitutional exercise of the police power,[21] petitioner also argued that the inclusion

13 1972 Mass. Adv. Sh. at 1311, 284 N.E.2d at 898.
14 Id. at 1312, 284 N.E.2d at 898.
15 Id.
16 See text at note 5, *supra.*
17 1972 Mass. Adv. Sh. at 1306, 284 N.E.2d at 895. The Court's use of a "reasonableness" test is puzzling. The implication is that flooding caused by an "unreasonable" artificial stimulus cannot be regulated by a zoning by-law. It is arguable that the implication was not intended, however, since artificial floods can be as deleterious to the public health, safety and welfare as a natural flood. See text at note 6, *supra.*
18 Id. at 1317, 284 N.E.2d at 901.
19 See text at note 6, *supra.*
20 1972 Mass. Adv. Sh. at 1317, 284 N.E.2d at 901.
21 See note 6, *supra.*

of his land in the Flood Control District had no reasonable relationship to any valid municipal power. In rejecting this claim the Court reviewed the evidence relied upon by the land court in its decision that petitioner's land was subject to flooding. The evidence included the testimony of an expert hydrologist to the effect that the land could be expected to be covered by up to three feet of water annually. This evidence of potential flooding, coupled with the fact that under the by-law use of the land was not totally prohibited[22] led to the conclusion that the restrictions placed on petitioner's land were not unreasonable.[23]

Petitioner argued that, even if the by-law was validly applicable to his land, his two knolls should not be included in the flood plain district. The evidence as to whether they had in fact been included by the town was conflicting. The town engineer had been instructed to include in the flood district only swamp areas below 98 feet elevation, thus excluding the two knolls which were at elevations of 121 feet and 111 feet, but the flood plain map accepted by a vote of a Dedham town meeting included the knolls in the Flood Plain District. The Court acknowledged that the inclusion of the knolls on the official map may have been inadvertent. However, it held the inclusion to be "sensible," since the petitioner would not be able to use these areas for residential purposes without first obtaining a special permit for access to the knolls over the surrounding land. Since a special permit would have to be obtained regardless of whether the knolls were included in the district, the Court upheld their inclusion.[24]

Finally, the petitioner argued that the by-law reduced the value of his land to such an extent as to amount to a taking without just compensation. Although there was conflicting evidence as to the exact reduction in value of the land, the trial judge acknowledged that the loss was substantial.[25] However, the Court agreed with the lower court judge that " 'the mere decrease in the value of a particular piece of land is not conclusive evidence of an unconstitutional deprivation of property.' "[26] Although the Court noted that the line between regulation and confiscation is often difficult to draw, it concluded that the decrease in the value of petitioner's land did not amount to an unconstitutional deprivation of property.[27]

§22.6. Definition of terms: "Lot" and "Farm." The use of the

22 See note 2, *supra.*

23 1972 Mass. Adv. Sh. at 1313-14, 284 N.E.2d at 899.

24 Id. at 1316, 284 N.E.2d at 901.

25 Petitioner's expert witness testified that the land was worth $431,000 as residential property, but that the restrictions reduced its value to $53,000. Respondent's witness testified that no reduction in value resulted, since it was economically unfeasible to develop the lowlands for residential use.

26 Id.

27 The Court cited, as an example of a great change in value that did not constitute an unconstitutional taking Hadacheck v. Sebastian, 239 U.S. 394 (1951), which involved a diminution in value from $800,000 to $60,000.

words "lot" and "farm" in zoning ordinances and by-laws is frequently important in determining if a particular use will be permitted. These words have posed considerable construction problems in the past. The interpretation of both words came before the Supreme Judicial Court during this SURVEY year.

In *Lindsay v. Board of Appeals of Milton*,[1] plaintiffs had applied for a building permit to construct a single family dwelling and garage on the locus but the permit was denied on the ground that the locus did not constitute a buildable lot. The locus had originally been a separate lot under a 1903 plan. This lot and another came into single ownership in 1920. Prior to 1945 the two lots had been transferred as separate lots, though under a single deed. In 1945 and again in 1967 both lots were deeded as a single parcel with a single description by metes and bounds.

Zoning was adopted by Milton in 1938. The by-law definition of "lot" was as follows: "A 'lot' is a single area of land in one ownership . . . [laid out] by metes, bounds or boundary lines in a recorded deed or on a recorded plan. . . ."[2] Another by-law[3] provided that dwellings could be erected on any lot established prior to 1938, but not on lots established thereafter, unless those lots contained 40,000 square feet with 150 feet of frontage. The locus fell short of the area and frontage requirements, but the plaintiffs claimed that the lot had been established prior to 1938 and was therefore exempted from those requirements.

The Court held that the by-law definition of "lot" referred to the description of the property in the most recently recorded deed or plan. Both the 1945 and 1967 deeds defined the locus as part of a larger single area, even though originally the locus was described as a separate lot. Thus, the attempt in the present case to change what was a single lot under the 1945 and 1967 deeds into the original two lots under the 1903 plan (and several other intermediate conveyances) was invalid.

The meaning of "farm" has also been frequently litigated because of the many agricultural and farming districts in towns with considerable land that is largely undeveloped, or at least not yet urbanized.[4] The question in *Moore v. Zoning Board of Appeals of Middleborough*[5] was whether a mink ranch was a "farm" under the local zoning by-law. Plaintiffs in *Moore* had been ordered to cease the raising of minks in a residential area because such activity did not conform to farming activities permitted by the by-laws. The Court had faced a similar problem in

§22.6. [1] 1972 Mass. Adv. Sh. 1199, 284 N.E.2d 595.

[2] 1972 Mass. Adv. Sh. at 1201, 284 N.E.2d at 597.

[3] Id.

[4] See, e.g., Hume v. Building Inspector, 355 Mass. 179, 243 N.E.2d 189 (1969); Pendoley v. Ferreira, 345 Mass. 309, 187 N.E.2d 142 (1963); Mioduszewski v. Saugus, 337 Mass. 140, 148 N.E.2d 655 (1958); Lincoln v. Murphy, 314 Mass. 16, 49 N.E.2d 453 (1943). The Court also noted the similarity between this type of case and the dairy farm case of Cumberland Farms of Conn. Inc. v. Zoning Board of Appeal, 1971 Mass. Adv. Sh. 357, 267 N.E.2d 906.

[5] 1972 Mass. Adv. Sh. 1811, 276 N.E.2d 712.

Commonwealth v. Proctor[6] where it held that "mink" were not "domestic or other animals" and that the land was not being used for "agricultural purposes." In *Moore,* the Court found no reason not to follow the earlier case and thus sustained the order for the Moores to cease their mink ranching. The defendant also argued that G.L., c. 128, §8B, defines "mink" as domestic animals, but the Court concluded that that provision applied only to the Agricultural matters specifically enumerated therein. The statutory language in no way affected the definition of "farm" in a zoning by-law, which has a totally different and unrelated purpose.

§22.7. Appeal by city counsel from board of appeal decision. G.L., c. 40A, §21, authorizes appeals from decisions of a local board of appeals by planning boards and municipal officers, as potentially aggrieved parties. Chapter 334 of the Acts of 1972 added "city council" to this group of officials and bodies who have a right of appeal. Although municipal officials and planning boards can adequately represent the public interest under most circumstances, there may be occasions when a city council, as the legislative body whose regulations are being interpreted by the board, should be the appellant.. While the enforcing and planning agencies will presumptively remain the appropriate parties to appeal, this amendment at least provides the opportunity for broader representation of public interests that may be opposed to the variance or special permit that has been granted.

§22.8. Zoning appeals: Jurisdictional requirements. In the 1967 case of *McLaughlin v. Rockland Zoning Board of Appeals,*[1] the Supreme Judicial Court was asked to determine the effect Section 21 of the Zoning Enabling Act[2] which provides that when an appeal to the superior court is taken from a decision of the zoning board of appeals, "[w]ritten notice of such appeal together with a copy of the bill in equity shall be given to [the] city or town clerk within . . . twenty day[s]" after the board has filed its decision. While the petitioner in *McLaughlin* had filed a copy of the bill with the clerk within the prescribed period, he failed to file the written notice required by section 21. The Court, nevertheless, did not consider the defective filing to be fatal to jurisdiction and allowed the appeal to be perfected. During the 1972 SURVEY year the Court was faced with a similar issue under a factual situation converse to that in *McLaughlin.*

In *Carr v. Board of Appeals of Saugus*[3] the petitioner filed his notice of appeal with the town clerk within the proper period of appeal[4] but did not file a copy of the bill in equity, the original of which had been timely filed in the superior court, until some ten days after the prescribed

6 355 Mass. 504, 246 N.E.2d 454 (1969).

§22.8. 1 351 Mass. 678, 223 N.E.2d 521 (1967).
2 G.L., c. 40A, §21.
3 1972 Mass. Adv. Sh. 513, 280 N.E.2d 199.
4 The 10-day period actually ended on a Sunday but the Court held that the notice was proper when filed on Monday.

period had elapsed. The superior court dismissed the bill holding that the failure to file a copy of the bill in a timely fashion was fatal to its jurisdiction over the matter. The Supreme Judicial Court reversed and remanded the case for determination on its merits.

Relying on *McLaughlin* as its basic authority, the Court reiterated that it was reluctant to attribute to the General Court an intent " 'to create a series of procedural barriers reminiscent of an earlier age of the law.' "[5] It noted that the purpose of the statutory requirement at issue "is to give interested third persons at least constructive notice of the appeal,"[6] and that therefore the filing of either the bill in equity or the notice of appeal would satisfy that purpose. The Court further pointed out that the circumstances in *Carr* presented an even stronger argument for adequate notice than had been presented in *McLaughlin* where a filing of a copy of the bill "constituted an implied representation that the original had been filed in the Superior Court."[7] The Court reasoned that the written notice filed in the *Carr* situation was "an express assertion that a bill in equity has been filed."[8]

It is difficult to object to a decision such as *Carr,* which prevents an apparently superfluous act from barring an appeal which may otherwise be valid. If we accept the Court's view that the purpose of the statutory provision in question is to give third parties notice of the appeal, then the filing of either the notice of appeal or the bill in equity should, as the Court concluded, meet this need. If, however, the purpose is also to give third persons some idea of the *nature* of the appeal, the filing of the bill in equity, as in the *McLaughlin* case, would more clearly meet the requirement. But the Court, with its emphasis on the fact of notice alone, comments that the filing of the notice in *Carr* would be a more certain fact than the filing of the bill in equity in *McLaughlin.*

Despite the liberal view taken in these cases, an attorney would be well advised to follow the strict requirements of the statute and not depend on these cases as setting a lesser standard. A faulty notice, unaccompanied by a bill, might well be inadequate even under the flexible view of the Court in these cases.

§22.9. Accessory uses. Zoning ordinances generally provide that land which is zoned for certain specified uses may also be used for "accessory uses" which, although not expressly permitted, are subordinate and closely related to the permitted uses. The accessory use is usually required to "be clearly subordinate to, and customarily incidental to, and located on the same premises with the main use or structure to which it is accessory."[1] The classic example is, of course, an auto-

5 1972 Mass. Adv. Sh. 513, 514, 280 N.E.2d 199, 200, quoting McLaughlin v. Rockland Zoning Bd. of Appeals, 351 Mass. 678, 682, 223 N.E.2d 521, 524 (1967).

6 1972 Mass. Adv. Sh. 513, 514, 280 N.E.2d 199, 200.

7 Id.

8 Id.

§22.9. 1 Town of Harvard v. Maxant, 1971 Mass. Adv. Sh. 1601, 1604, 275 N.E.2d 347, 349.

mobile garage in a residential zone. However, it is important to note that the accessory use must be exactly that—accessory—and that it will not be permitted unless the land upon which the subordinate use takes place is attendant to or co-extensive with the land used for the primary permitted use.

In *Town of Harvard v. Maxant,*[2] decided during the 1972 SURVEY year, the Supreme Judicial Court indicated one use that will not be considered as "accessory" for purposes of the accessory use doctrine. The town sought and obtained an injunction to prevent defendant from using land he owned, but upon which he did not reside, as a private airport. Defendant appealed from a final decree entered in favor of the town arguing that his use of the property was a private recreational use of residential property not inconsistent with the regulatory scheme of the town's zoning by-law. The Court encountered no difficulty in dispensing with defendant's appeal. Perhaps more importantly, the *Maxant* opinion may provide some inkling of how the Court will view future appeals in accessory use cases.

The major point in defendant's appeal concerned zoning by-law provisions which proscribed and permitted certain types of activities as accessory uses. Defendant argued that, since a private landing strip is not a use encompassed within those *prohibited* by the by-law, such a unique use would, consequently, be a permitted accessory use. The Court rejected this thesis as "oversimplified," noting that "[t]here is no requirement that zoning by-laws or ordinances follow any particular pattern or structure. They may take the form of prescribing uses permitted, proscribing uses prohibited, or a combination of the two."[3]

The Court's treatment of what will, or will not, constitute an "accessory" relationship also merits comment. In *Maxant,* the defendant neither resided nor conducted any activity on the premises other than using it as an airport. In the absence of some dominant permitted use it cannot be said that a particular use is "accessory." To be an accessory use "the use must not be the primary use of the property but rather one which is subordinate [to the primary use] and minor in significance [thereto]."[4]

A third aspect of the *Maxant* case concerns the question of what will be considered a "customary" accessory use, given the existence of a primary-subordinate use relationship. Although the Court noted that its decision in *Maxant* is limited to the peculiar factual situation presented therein and will not necessarily portend the Court's treatment of a similar case at a future time when private landing strips are more pre-

2 1971 Mass. Adv. Sh. 1601, 275 N.E.2d 347.

3 Id. at 1604, 275 N.E.2d at 350.

4 Id. at 1606, 275 N.E.2d at 351.

valent,[5] it should be noted that the *Maxant* ruling indicates a rather skeptical view of what will constitute a "customarily incidental" accessory use.

The present case is a to-be-anticipated application of the doctrine of accessory uses. The lengthy and detailed discussion of the attributes necessary for a use to be defined as accessory is, however, of substantial importance in clarifying this area of the law.

§22.10. Nonconforming uses: Expansion of use: Billboard regulation. Under G.L., c. 40A, §5, no zoning by-law or ordinance may prohibit any buildings and uses in existence at the time of adoption, even if such buildings and uses are inconsistent with the adopted zoning scheme. However, the statute also provides that *subsequent changes* in nonconforming uses may be subject to zoning regulations. In two cases decided during the 1972 SURVEY year[1] the Supreme Judicial Court was asked to rule on the scope of the protection given to nonconforming uses by G.L., c. 40A, §5.

McAleer v. Board of Appeals of Barnstable[2] arose when the East Bay Lodge received a use-change permit from the Barnstable Board of Appeals. The lodge, a hotel-restaurant complex, had been built in 1900, and became a "non-conforming use" in 1956 when Barnstable adopted a zoning by-law. At that time it was operated only during the summer months; however, after receiving a year-round liquor license in 1965, it was operated on a year-round basis. The use-change permit allowed the operator to make physical alterations on the main lodge building and a separate cottage used for rental purposes, and to convert two employee dormitories into rental facilities. The permit was granted pursuant to zoning by-law provisions that were sympathetic to the expansion and continuation of nonconforming uses.[3]

Plaintiffs, owners of abutting real estate, brought two actions to contest the lodge's expansion. In the first action, brought by a bill in equity,[4] plaintiffs sought an annulment of the board's permit and a judicial ruling that the proposed use changes were inconsistent with the local

[5] The Court distinguished two cases from other jurisdictions, Schantz v. Rachlin, 101 N.J. Super. 334, *aff'd,* 104 N.J. Super. 154 (1969) (cited by defendant Maxant) and Samsa v. Heck, 13 Ohio App.2d 94, 235 N.E.2d 312 (1967) (cited by the plaintiff town), in which "the question whether a private landing strip is accessory to a residential use" was litigated. See 1971 Mass. Adv. Sh. at 1608, 275 N.E.2d at 352.

§22.10. [1] McAleer v. Bd. of Appeals of Barnstable, 1972 Mass. Adv. Sh. 469, 280 N.E.2d 1966; John Donnelly and Sons, Inc. v. Outdoor Advertising Board, 1972 Mass. Adv. Sh. 1057, 282 N.S.2d 661.

[2] 1972 Mass. Adv. Sh. 469, 280 N.E.2d 166.

[3] The board ruled that the proposed alterations to the four buildings and the net result stemming therefrom would not "exceed, extend or change the prior existing use . . . and that such alterations would not be more detrimental to the neighborhood." Record at 14.

[4] G.L., c. 40A, §21 provides that review of action taken by municipal boards of appeal may be had by a bill in equity.

zoning by-law. In the second action, brought by a petition for mandamus, plaintiffs also sought court orders prohibiting the lodge from operating the premises other than during the summer months.[5] The two actions were consolidated for trial in the superior court. The court annulled the board's permit insofar as it related to the two dormitories because "the nature and purpose of the use prevailing"[6] prior to 1956 was vastly different from the rental housing now proposed by the lodge. The trial justice affirmed the Board's permit as it related to structural modifications of the lodge and the cottage since the planned alterations did not substantially change the nonconforming use. On the mandamus action, the trial justice ruled that "the change from 'seasonal to year-round operation' constituted an unlawful expansion of the nonconforming use, and that the operation of the Lodge must be restricted to the four summer months."[7]

On appeal the Supreme Judicial Court sustained the superior court rulings on the bill in equity.[8] The key issue on review concerned the standard invoked by the Board in issuing the disputed permit. Under the Barnstable zoning by-law nonconforming uses may be changed only where the intended use is *not more detrimental to the neighborhood,* while special permits may be issued only where, *inter alia,* it is clear that the effect of the intended activity will be *without substantial detriment to the public good.* The Board predicated its decision to permit extension of the Lodge's nonconforming use upon a finding that "the alterations sought by the Lodge 'would not be more detrimental to the neighborhood,' "[9] thus applying the nonconforming use standard. Plaintiffs argued that since the proposed changes would require a special permit, the nonconforming use standard was inappropriate and, accordingly, the Board's findings should be vitiated. The Court rejected this contention, stating that decisions to issue special permits for nonconforming uses may be predicated upon nonconforming use criteria instead of special permit

5 In the mandamus action, plaintiffs sought to compel the town building inspector to act to limit the Lodge's inn business to the summer season, and to enjoin the Lodge from conducting its business in other than the summer months. Record at 15-17.

6 Record at 30.

7 1972 Mass. Adv. Sh. at 471, 280 N.E.2d at 168. In the mandamus action, plaintiffs also argued that the Lodge should be allowed to conduct its bar and restaurant business only for its lodgers. The trial judge rejected this contention, and the plaintiffs did not successfully perfect their appeal of this ruling.

8 The Court affirmed the trial court determination that the conversion of the dormitories from employee housing into rental lodging was a change "not only in the use but also in the nature of the facilities," which under the town zoning by-law would be an unlawful extension of the nonconforming use. The Court also upheld the trial court approval of the board's issuance of a permit for the other two structures, finding that the alterations proposed therefor comported with the scope of change permitted under the by-law. 1972 Mass. Adv. Sh. at 473-4, 280 N.E.2d at 169.

9 1972 Mass. Adv. Sh. at 472, 280 N.E.2d at 168.

standards. Moreover, "[t]he distinction between the two phrases, 'not more detrimental to a neighborhood,' and 'without substantial detriment to the public good,' at least in this case, is one of words and not of substances."[10] Noting that the Board applied the stricter of the two standards, the Court held that the proper standard was applied.

Turning to the mandamus appeal, the Court reversed the trial court's issuance of the writ. The major issue was whether the expansion from a seasonal to a year-round use was a mere increase in business intensity, or an unlawful expansion of a nonconforming use. Although the town by-law provided "little explicit guidance" on this point, the Court construed it as expressing "a spirit sympathetic to nonconforming uses and their expansion,"[11] and thus as differing from many other ordinances and by-laws which expressly prohibit, or drastically inhibit, expansion of nonconforming uses.[12] In upholding the expansion the Court relied upon a Maine case which held that an ordinance with a similarly liberal approach to expansion of nonconforming uses permitted an inn to shift from a seasonal to a year-round operation.[13] The Court distinguished *McAleer* from other cases where it was proven that the expansion to a year-round operation would result in a "deleterious effect,"[14] or where year-round operation was one of a series of elements which would make the expansion grossly incompatible with the zoning scheme.[15]

Another issue raised in the mandamus appeal was the extent to which a defendant can rely upon laches to forestall the enforcement of a municipal zoning enactment. The lodge owner argued that, although the doctrine of estoppel can never preclude a municipality from enforcing its zoning laws,[16] the failure of any *private citizens* to contest the issuance of the year-round liquor license in 1965 precluded the present suit. The lodge owner relied upon *Chilson v. Zoning Board of Appeal of Attleboro*.[17] in which the Supreme Judicial Court used the doctrine of laches to reject a private challenge to a building inspector's illegal approval of a nonconforming use. Although the lodge owner had made a heavy investment in remodeling the lodge after receiving the liquor license, the Court rejected his defense: "We feel here that the policy

10 Id.

11 Id. at 474, 280 N.E.2d at 170.

12 The Court cited Inspector of Bldgs. v. Murphy, 320 Mass. 207, 68 N.E.2d 918 (1946) as representative of a by-law unsympathetic toward expansion of nonconforming uses.

13 Frost v. Lucey, 231 A.2d 441 (Me. 1967).

14 Hantman v. Randolph, 58 N.J. Super. 127, 155 A.2d 554 (1959).

15 The Court thus distinguished Everpure Ice Mfg. Co. v. Board of Appeals, 324 Mass. 433, 86 N.E.2d 906 (1949), in which the change in times of the operation also involved change in the nature of the business.

16 Ferrante v. Board of Appeals of Northampton, 345 Mass. 158, 162, 186 N.E.2d 471, 474-75 (1962), and cases cited.

17 344 Mass. 406, 182 N.E.2d 535 (1962).

favoring enforcement of the zoning by-law outweighs the possibility that a *Chilson*-type ruling might be made applicable here because of laches."[18]

Apart from demonstrating the maze of procedural ploys that may obfuscate a zoning issue,[19] *McAleer* indicates how the Court views issues involving the expansion of a nonconforming use. The Court is apparently inclined to allow municipalities to adopt a wide spectrum of zoning regulations governing the expansion of nonconforming uses, whether sympathetic or adverse thereto. *McAleer* also indicates that the Court will not, as a matter of course, invoke the doctrine of estoppel to bar private challenges, however belated, to municipal permits issued in violation of nonconforming use regulations.

The application of the nonconforming use exception to billboard regulation was the subject of litigation in *John Donnelly & Sons, Inc. v. Outdoor Advertising Board.*[20] G.L., c. 93, §29 vests in the Outdoor Advertising Board the authority to issue permits regulating the operation of billboards throughout the Commonwealth. Prior to 1969 the board's regulations had "protected billboards in business and industrial areas to a considerable extent . . . , although they [had] imposed restrictions upon billboards in other areas."[21] In 1969, however the board amended its regulations to accord controlling weight to local by-laws in its annual review of billboard permits.[22] This regulation prompted the Town of Avon to amend its zoning by-law to prohibit billboards within five hundred feet of various public and quasi-public buildings and facilities.[23] When the plaintiff applied for renewal of its billboard permit, the board rejected it. Finding that plaintiff's billboard was within five hundred feet of a structure enumerated in the town by-law, the board voted not to renew the permit because of this contravention of the local zoning enactment.

Plaintiff sought judicial review of the board's decision, and appealed the superior court's affirmance of that decision. Both the board's amended

18 1972 Mass. Adv. Sh. at 474, 280 N.E.2d at 169.

19 Indeed, in analyzing the trial court's handling of the board's decision to issue the special expansion permits, Justice Reardon appears to have overlooked a consideration of the facts underlying the board's decision to permit remodelling of the fourth structure, the cottage, 1972 Mass. Adv. Sh. 473-4, 280 N.E.2d at 169.

20 1972 Mass. Adv. Sh. 1057, 282 N.E.2d 661.

21 Id. at 1059, 282 N.E.2d 663.

22 The 1969 amendment to the board's regulations reads in pertinent part: "No license or *permit shall be granted for* the location or maintenance of *billboards . . . within a . . . town* except where such *location or maintenance is in conformity* with applicable . . . by-laws enacted in accordance with . . . [G.L., c. 93, §29] and no . . . by-law shall be deemed inconsistent with the . . . [board's] rules and regulations . . . on the ground that such . . . by-law prohibits the location or maintenance of a billboard . . . which in the absence of . . . [the] by-law would be in conformity with . . . [board's] rules and regulations." (Emphasis supplied by the Court). Id. at 1059-60, 282 N.E.2d at 664.

23 Id. at 1957 n. 1, 282 N.E.2d at 662 n. 1.

regulation and the town's amended zoning by-law were attacked as invalid.[24] For present purposes, plaintiff's major argument was that G.L., c. 40A, §5 precluded the board from declining to renew the billboard permit. The billboard in question had been erected some forty years prior to the enactment of the billboard by-law. Since the billboard thus became a nonconforming use, plaintiff argued that the protection accorded such uses by G.L., c. 40A, §5 would preclude the board's refusal to permit continued use of the billboard. The Court rejected this purported application of Section 5. Plaintiff had "obviously accepted the original and each subsequent permit for this billboard with knowledge that the permit was for a term of one year and was revocable by the board for cause."[25] Further, absent a permit the billboard would be categorized as a "nuisance,"[26] and would thus be subject to removal. The Court held that the owner of a billboard cannot avail himself of the protection provided nonconforming uses under G.L., c. 40A, §5:

> Where a billboard permit thus is essentially temporary, and where, in the absence of a required permit renewal, the billboard would constitute a public nuisance, we hold that it has not gained the status of a vested right constituting a protected nonconforming use under G.L., c. 40A, §5, as amended.[27]

Further, the Court added that while Massachusetts "has no established principle of amortization of billboards for which permits are not renewed," plaintiff had little basis upon which to claim a protectible property interest since the controverted billboard had been in existence for a period of time longer than those which have been held to be proper periods of amortization.[28]

The *Donnelly* case reflects the very low protection now given to billboards. The annual nature of the permit does not properly establish

[24] Plaintiff argued that the board's regulation giving deferrence to local by-laws regulating billboards was an improper delegation of the board's power to regulate outdoor advertising. Brief for Petitioner at 5. Concomitantly, plaintiff argued that Avon's billboard by-law was inconsistent with Chapter 93, inasmuch as that statute gives the board the authority to regulate billboards. Brief for Petitioner at 22-28. The Court rejected both arguments, holding that the board's regulatory powers were broad enough to permit some reliance on local regulations. 1972 Mass. Adv. Sh. at 1062-63, 282 N.E.2d at 665-666. The Court was aided by G.L., c. 93, §29, which, after granting regulatory power to the board, provides that "[c]ities and towns may further regulate and restrict . . . billboards . . . within their respective limits by ordinance or by-law, not inconsistent with . . . said rules and regulations.

The Court also rejected the plaintiff's argument that Avon's billboard by-law was an arbitrary, capricious and unreasonable exercise of the police power: "[T]he by-law is well within the general power to zone or to regulate for the public welfare." 1972 Mass. Adv. Sh. at 1065, 282 N.E.2d at 667.

[25] 1972 Mass. Adv. Sh. at 1065, 282 N.E.2d at 667.

[26] G.L., c. 93, §§30A and 31.

[27] 1972 Mass. Adv. Sh. at 1066, 282 N.E.2d at 668.

[28] Id. at 1066-7, 282 N.E.2d at 668.

any rights to a continuation of a permit, even if the practice has been to grant one readily. At a time when aesthetics and ecology are treated as valid public values, billboards cannot be expected to receive any extensive protection as a nonconforming use. The decision opens the way to extensive local regulation of billboards. Furthermore, it would seem that the Court's dictum similarly opens the way to extensive amortization of billboards pursuant to carefully drawn regulations.

§22.11. Special permits. G.L., c. 40A, §4 confers upon cities and towns the statutory authority to grant special permits. It states that, subject to various procedural requirements, each zoning enactment may include provisions which allow for exceptions to the regulations and restrictions contained in the enactment and which provide for the issuance to individual applicants of special permits in accordance with the exceptions. Exceptions must "be in harmony with the general purpose and intent" of the zoning enactment, and special permits may be granted "subject to appropriate conditions and safeguards."[1] During the 1972 SURVEY year, the Supreme Judicial Court decided three cases, *Shuman v. Board of Aldermen of Newton*,[2] *Josephs v. Board of Appeals of Brookline*,[3] and *Humble Oil & Refining Company v. Board of Appeals of Amherst*,[4] in which the validity of actions taken pursuant to the special permit provisions of local zoning enactments and the statutory enabling provision of G.L., c. 40A, §4 were at issue.

Shuman v. Board of Aldermen of Newton[5] was, perhaps due to the unique factual situation presented, one of the Court's most innovative decisions in the special permits area. In *Shuman,* a private foundation sought to use a home located within a single-family residential district as a "half-way house" for high-school age runaways.[6] The Newton zoning ordinance provided that the Board of Aldermen may grant a special permit for certain categories of uses in single-family residential districts.[7] The foundation's petition was referred to the Land Use Committee which considered the proposal and, after public hearing, recommended that the board grant the special permit subject to certain conditions. At a public meeting, the full board was given an oral report of the committee's recommendations. The board thereupon voted to adopt an order which

§22.11. [1] G.L., c. 40A, §4.

[2] 1972 Mass. Adv. Sh. 963, 282 N.E.2d 653.

[3] 1972 Mass. Adv. Sh. 1405, 285 N.E.2d 436.

[4] 1971 Mass. Adv. Sh. 1781, 276 N.E.2d 718.

[5] 1972 Mass. Adv. Sh. 963, 282 N.E.2d 653.

[6] The petition was to operate a " 'dwelling for persons of high school age . . . who are alienated from living with their parents.' " 1972 Mass. Adv. Sh. at 964, 282 N.E.2d at 655.

[7] Some of the additional uses for which the ordinance permitted special permits include: "(1) *Association of persons living together in a common dwelling.* (2) Hospital, sanitarium . . . or other like institution. (3) Nursery school, trade . . . or vocational school, *dormitory . . . or other* literary or *educational institutions.*" 1972 Mass. Adv. Sh. at 964 n.2, 282 N.E.2d at 656 n.2 (emphasis supplied by the Court).

granted the permit. The order was formally filed with the city clerk. Subsequently, another document was filed with the clerk in which the rationale of the board's action was set forth. Prior to this second filing, the reasons for the board's decision were not on file with the clerk.

Plaintiffs, residents in the vicinity of the building which the foundation proposed to operate as a "half-way house," appealed the board's decision. They challenged the special permit order on the grounds that the procedure by which it was granted was replete with irregularities. The superior court sustained the board's decision, finding that, if the conditions imposed by the order were adhered to, the proposed use would not have a deleterious effect upon the neighborhood; indeed, the court suggested that the proposed use would probably enhance the neighborhood in question. The court also found that the special permit was properly granted pursuant to a valid municipal zoning procedure. On appeal the Supreme Judicial Court affirmed the trial court's ruling.

The Court dealt with a number of issues in plaintiffs' appeal. Plaintiffs first argued that the detailed findings required in variance permits by G.L., c. 40A, §18 were also required in special permit grants, and that the permit was invalid because it was granted by way of a city *order* which did not contain such findings. Although the board's decision was "cast in the form of an order," the Court found that any technical deficiencies contained therein were "insubstantial" and immaterial. Nonetheless, the Court did warn that "[t]his board, and other boards acting in like situations, should prepare decisions with more specific and complete findings and statements of reasons."[8] In addition, the procedural deficiencies of this case were cured by three other factors, namely, (1) the detailed conditions of use that were stated in the order, (2) the "supplemental statement" which was filed with the city clerk "within a reasonable time" of the board's original order, and (3) the written text of the committee's recommendations. The cumulative effect of these documents was sufficient to provide satisfactory evidence of the board's basis of decision. The Court went on to indicate that "[w]ith respect to a permit for an exception, the specific requirements of a variance [G.L., c. 40A, §18] need not be satisfied."[9]

Plaintiffs next argued that the use as a "half-way house" did not conform to any of the categories of use exceptions enumerated in the Newton by-law,[10] and therefore the committee's recommendation and the board's order granting the permit were predicated upon the application of an unconstitutionally vague standard. The Court responded that the proposed use could qualify under at least one, if not all three, of the use exceptions authorized by the zoning ordinance.

The *Shuman* Court also sustained the validity of a permit as granted to a specific permit holder *only for that holder's own use.* In the 1958

8 1972 Mass. Adv. Sh. at 968, 282 N.E.2d at 658-59.
9 Id. at 969, 282 N.E.2d at 659.
10 See notes 6 and 7, *supra.*

decision of *Todd v. Board of Appeals of Yarmouth,*[11] the Court had intimated that the language of the special permit section of the Zoning Enabling Act, G.L., c. 40A, §4, does not preclude, but in fact admits of, the granting of permits personal to the grantee: "The power to give permits for exceptions is so worded as to suggest that personal use may be contemplated. . . ."[12] An opposing argument can, of course, be made that zoning statutes are designed to regulate *land,* not to determine permitted land use on the basis of who, at a particular point in time, happens to be in possession or control thereof. The special permit, however, is a unique land use device designed to provide municipal zoning authorities with sufficient flexibility to permit select variations from zoning schemes. Because the success of these variations often depends upon a determination that the permit seeker is not irresponsible, the granting of a special permit which is limited, in appropriate cases, to one person or a group ought to be allowed. On the other hand, "personal" permits are privileges which should not be lightly granted lest they give any one person special advantages over his neighbors. It is submitted that, except in situations similar to *Shuman* where the particular use of the land involves a strong public policy, the use of "personal" special permits should be discouraged since sufficient safeguards can be achieved by the insertion of carefully drafted conditions in special permit grants.

In a second case involving procedures for the granting of special permits, *Josephs v. Board of Appeals of Brookline,*[13] the Supreme Judicial Court annulled the granting of a special permit where there was insufficient evidence of compliance with statutory and by-law prerequisites. Despite an incomplete factual presentation by the developer, the Brookline Board of Appeals granted special permits for the construction of an oddly-shaped building. On appeal, a superior court judge sustained these grants, relying exclusively upon the incomplete data presented to the board. Despite provisions of the Brookline zoning by-law which explicitly required the application of mathematical formulae in determinations concerning special permit grants, neither the trial judge nor the board required strict adherence to the by-law provisions. Because of this patent disregard of the express provisions of the Brookline zoning enactment, the Court invalidated the special permit.

Josephs is indicative of the Court's intention to require municipal zoning authorities to comply with the zoning strictures they purport to enforce. Moreover, this decision underscores the hazards faced by developers who attempt to proceed with insufficient factual data. After Josephs, even if a local zoning board is sympathetic to a particular proposal, the board may well be reluctant to grant a permit where there is an incomplete factual record.

11 337 Mass. 162, 148 N.E.2d 380 (1958).

12 Id. at 169, 148 N.E.2d at 384-85.

13 1972 Mass. Adv. Sh. 1405, 285 N.E.2d 436. Josephs also dealt with a variance issue. See §22.13., at text accompanying note 5-7, *infra.*

In a third case involving special permits, *Humble Oil & Refining Company v. Board of Appeals of Amherst,*[14] the Court reiterated a doctrine now clearly if only recently established in the Commonwealth, namely, that G.L., c. 40A, §4 does not create an absolute right to a special permit, even if there is total compliance with the conditions specified in the zoning enactment.[15] Plaintiff sought permission to construct and operate an automobile service station in a limited business district. The Amherst zoning by-law states that special exceptions to zoning district limitations "may" be authorized upon a finding by the Board of Appeals that certain criteria are met. The board rejected plaintiff's application upon finding that further development of that business district, when coupled with the steadily increasing traffic flow through the area, would create a hazardous traffic situation. Plaintiff appealed the board's decision, claiming that compliance with the by-law conditions entitled him to a special permit as a matter of right.

The superior court rejected plaintiff's claim, and the Supreme Judicial Court affirmed, holding that the pertinent by-law had a *permissive,* and not mandatory meaning and that G.L., c. 40A, §4 does not create a right to a special permit since a board of appeals retains discretionary power. A board's discretionary exercise of authority may be successfully challenged only in instances where the decision has been based upon a " 'legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary.' "[16]

§22.12. Variances. During the 1972 SURVEY year the Supreme Judicial Court decided four cases in which variance issues were involved. Although none of these cases heralded any major change or development in the law, they are useful for further defining existing variance law.

In *Josephs v. Board of Appeal of Brookline*[1] a superior court decree sustaining a variance grant was appealed.[2] The variance granted was for a reduction in height of a loading bay in a building to be used for medical offices and for elderly housing. Since the topography of the locus made strict adherence to the Brookline zoning by-law loading bay requirements either too dangerous, if too steep a driveway slope were used, or too costly, if it were decided to sacrifice floor area to meet the by-law requirements, the town Board of Appeals granted the variance. On appeal *de novo,* a superior court judge found that literal adherence to the by-law requirement would create a "hardship, financial or other-

[14] 1971 Mass. Adv. Sh. 1781, 276 N.E.2d 718.

[15] See Zaltman v. Board of Appeals, 1970 Mass. Adv. Sh. 755, 258 N.E.2d 565.

[16] 1971 Mass. Adv. Sh. at 1782, 276 N.E.2d at 720, citing MacGibbon v. Board of Appeals, 356 Mass. 635, 639, 255 N.E.2d 347, 350 (1970) and Gulf Oil Corp. v. Board of Appeals, 355 Mass. 275, 277, 244 N.E.2d 311, 313 (1969).

§22.12. [1] 1972 Mass. Adv. Sh. 1405, 285 N.E.2d 436.

[2] The case also involved appeal of special permit grants. See text accompanying notes 13-14, *infra.*

wise" for the developer.[3] In addition, the trial judge determined that the variance in question would not substantially derogate from the zoning by-law purpose nor would it be substantially detrimental to the public good. The Supreme Judicial Court affirmed the trial court's ruling.

In *Johnson v. Board of Appeals of Wareham,*[4] plaintiff challenged a decision to grant a variance permitting a religious congregation to alter the use of its church. The congregation had sought, and was granted, a variance to convert its church, located in a residential zone, into office suites. On appeal to the superior court, the board's grant was sustained, the trial judge finding that conversion to residential purposes was a less economically viable alternative than conversion to office space. The Supreme Judicial Court sustained the variance grant,[5] holding that the hardships incident to any other disposition of the property justified the variance: "The hardship in not being able reasonably to use this unusual, if not unique, and substantial 'existing building' . . . for any permitted purpose brings the case within authorities [allowing variances because conversion to meet applicable zoning strictures was less economically feasible than conversion to some other use[6]], rather than cases [which rigidly define what sort of hardship will justify a variance[7]]."

These two cases suggest a growing judicial hospitality to economic arguments in the determination of hardship. The denial of a variance would not have rendered the locus worthless in either the *Johnson* or the *Josephs* case. In *Johnson,* the church site could have been renovated for residential purposes, albeit at much greater expense.[8] In *Josephs,* although it may have been "dangerous" to have too steep a driveway slope, the developers could have been required to sacrifice some floor area in order to conform to the loading bay height requirements. Clearly, the standard

3 1972 Mass. Adv. Sh. at 1408, 285 N.E.2d at 438, stating one of the criteria required by G.L., c. 40A, §15, cl. 3.

4 1972 Mass. Adv. Sh. 56, 277 N.E.2d 695 (Rescript Opinion).

5 Although the entire Court agreed with the trial judge's finding "that the variance 'could be granted without substantial detriment to the public good' or substantial derogation from the purpose of the by-law," only a majority of the justices agreed with his conclusion that the situation presented to the congregation involved a "hardship." Id. at 56, 277 N.E.2d at 696.

6 Id. citing Dion v. Board of Appeals, 344 Mass. 547, 551-552, 183 N.E.2d 479, 482 (1962) and Sherman v. Board of Appeals, 354 Mass. 133, 134-136, 235 N.E.2d 800, 801-03 (1968). Id.

7 Id. citing Bouchard v. Ramos, 346 Mass. 423, 426, 193 N.E.2d 691, 692 (1963); McLaughlin v. Rockland Zoning Board of Appeals, 351 Mass. 678, 683, 223 N.E.2d 521, 524-25 (1967); and Garfield v. Board of Appeals, 356 Mass. 37, 40-41, 247 N.E.2d 720, 722 (1969).

8 "To demolish the church would cost about $1,500. The vacant lot then would be worth about $3,000. The approximate cost of renovating the church for dwelling use (exclusive of land cost) would be $20,000 for a single residence and $42,000 for two apartments. Three office suites could be put in the building for about $26,000. There was evidence that the locus would then be worth about $45,000." 1972 Mass. Adv. Sh. at 56, 277 N.E.2d at 696.

of economic hardship applied in both cases was *substantial* and not total loss.

In a third variance case, *Kelloway v. Board of Appeal of Melrose*,[9] the Melrose Housing Authority sought variances to permit construction of a high-rise elderly housing facility in a residential area. Although the variance requests were grossly inconsistent with the general tenor of the city's zoning ordinance, the board granted the authority's petition. The board's action stemmed largely from the fact that further delays in completing the project would jeopardize state funding and result in a concomitant forfeiture of sizeable development costs already expended by the city. The board noted in its decision that the variances would not have been granted if the applicant had been a private developer instead of an agency charged with carrying out public and governmental functions. Nonetheless, the board admitted that its determination in this case was fraught with irregularities and that, if fiscal exigencies had not required precipitous action, the public purpose to be served by this facility could have been more properly accomplished: " 'it would have been more appropriate for the board of aldermen to [have] revise[d] the zoning ordinances to exempt property [owned by the authority from] . . . the zoning laws.' "[10]

All challenges to the board's proceedings were dismissed by the superior court.[11] On appeal, the Supreme Judicial Court considered two unique issues: (1) the propriety of the variance under the special Melrose zoning statute, and (2) the need for special remedies in cases involving public projects. At the time the variances in question were being considered by the Melrose board, that board was operating pursuant to its own enabling act.[12] Even though this special legislation provided for a variance-granting procedure "more flexible" than that allowed under the state Zoning Enabling Act, G.L., c. 40A, §15, the Court held that the variances still conflicted with the general purpose of the Melrose zoning ordinance and, accordingly, should not have been granted.[13] But

9 1972 Mass. Adv. Sh. 399, 280 N.E.2d 160.

10 Id. at 403, 280 N.E.2d at 164.

11 Plaintiffs brought two actions, a petition for a writ of certiorari and a bill in equity under G.L., c. 40A, §21, to obtain review of the board's decision. In Fairman v. Board of Appeal, 331 Mass. 160, 117 N.E.2d 829 (1954) it was stated that, because the special enabling act under which the Melrose board was constituted contained no provision for appeal to the superior court, a petition for a writ of certiorari was the appropriate method of obtaining review of that board's decision. Since a 1954 revision to the general zoning enabling act followed the Fairman decision and thereby cast some doubt upon the applicability of the Fairman ruling to subsequent appeals of the Melrose board's decisions, plaintiffs also opted to pursue a remedy by bill in equity pursuant to G.L., c. 40A, §21. In Kelloway, the court resolved this gray area by reiterating the Fairman holding that the sole remedy to be used in appealing a decision of the Melrose board is certiorari. 1972 Mass. Adv. Sh. at 400 n.2, 280 N.E.2d at 162 n.2.

12 Acts of 1924, c. 22, repealed by Acts of 1971, c. 598.

13 The Court stated that, had construction not proceeded on the project, the

by the time the case was heard and decided by the Supreme Judicial Court, the project had been completed and occupied. Inasmuch as demolition would "frustrate the [project's] public purpose" and waste the large public expenditure that had financed it, the Court stated that a form of relief more flexible than that which is usually employed in zoning appeal cases would have to be fashioned.[14] Accordingly, the Court agreed that plaintiffs' request for an assessment of damages would be the only practicable remedy. However, the damages would be recoverable *only* in the event that the Melrose Board of Aldermen failed within eight months to pass an ordinance exempting this project from the provisions of the zoning ordinance.[15]

Finally, in *Broderick v. Board of Appeal of Boston,*[16] the Supreme Judicial Court considered two issues that arose from the appeal of variances granted to the Faulkner Hospital Corporation by the Boston Board of Appeals: (1) the scope of the bonding requirement under the special Boston zoning statute,[17] and (2) the propriety of a variance which permitted a hospital to construct a replacement facility and a motor vehicle garage which did not conform to zoning by-laws. Plaintiffs, inhabitants of the residential district in which the hospital is located, brought two actions contesting the board's decision to grant the two variances requested by the hospital.[18] The special Boston zoning statute requires that any person who appeals a decision of the board of appeal must file a bond sufficient to discourage "frivolous and vexatious" appeals of that board's decision.[19] Shortly after the suits were filed, plaintiffs were ordered to file a $1,000,000 appeal bond. This order was subsequently amended to require only a $50,000 bond. Later, following the decision of *Damaskos v. Board of Appeal* (which stated that the amount of such bonds should not be such as to discourage meritorious appeals),[20] plaintiffs' bond requirement was further reduced to $5,000 and remained at that level during the trial on the merits. On the day when a final decree on the merits could have been entered, the two actions by now having

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board's decision to grant the variance would have been set aside on petition for writ of certiorari. 1972 Mass. Adv. Sh. at 405, 280 N.E.2d at 165.

14 1972 Mass. Adv. Sh. at 405-06, 280 N.E.2d at 165.

15 Because certiorari still remained as the sole remedy for appealing decisions of the Melrose board (see note 11, *supra*) and the bill in equity brought under G.L., c. 40A, §21 was unavailing as a remedy, the Court granted plaintiffs leave to amend the petition for a writ of certiorari and submit in place thereof a bill in equity for declaratory relief under G.L., c. 231A. 1972 Mass. Adv. Sh. at 406, 280 N.E. 2d at 165.

16 1972 Mass. Adv. Sh. 633, 280 N.E.2d 670.

17 Acts of 1956, c. 665.

18 Both actions were commenced by bill of complaint pursuant to Acts of 1956, c. 665, §11.

19 Acts of 1956, c. 665, §11.

20 1970 Mass. Adv. Sh. 1201, 1215, 261 N.E.2d 336, 346, noted in 1971 Ann. Surv. Mass. Law §17.2.

been consolidated, the trial court entered an interlocutory order requiring that plaintiffs replace the $5,000 bond with a $100,000 bond as a prerequisite to the entry of a final decree. The order further stipulated that, if this increased bond were not filed, plaintiffs' bills would be dismissed, thus precluding further direct review on the merits by the Supreme Judicial Court. Because plaintiffs refused to meet this increased bond requirement, the suits were dismissed.

Plaintiffs appealed this procedural outcome,[21] contending that the trial court's action in increasing the bond amount prior to entry of final decree was contrary to the purpose underlying the statutory bond requirement. The Court agreed with this contention, and stated that it was erroneous to require the posting of additional surety as a condition to the entry of the final decree since there had been a full hearing and the case was "ripe for entry of a final decree on the merits."[22] Once such a full hearing has been held, the legislative purpose promoting the bonding requirement, namely, the discouragement of "frivolous and vexatious" appeals, has been accomplished and any increase in bond is without purpose. However, the Court warned that this aspect of the *Broderick* ruling "should not be construed as conferring on an appellant from a final decree in the Superior Court in a zoning case an absolute right to appeal to [the Supreme Judicial Court] without filing a surety bond."[23] Since the statutory rules generally governing equity appeals[24] also apply to appeals to the Supreme Judicial Court under the Boston zoning law, plaintiffs appealing from a superior court final decree may be ordered by a justice of the superior court or the Supreme Judicial Court to post a surety bond in any amount.[25]

Having determined that the superior court erred in dismissing plaintiffs' suits, the Court proceeded to consider the merits of the issues raised in plaintiffs' appeal of the board's decision. Plaintiffs argued that the board exceeded its authority in granting the variances because the variances would cause " 'substantial detriment to the public good and [a substantial derogation] from the intent and purpose of the Boston Zoning Code.' "[26] However, the Court concluded that the variances not only met the minimum conditions required for the grant of variances but, indeed, *advanced* the purposes underlying the statute. The Court said:

21 G.L., c. 214, §19.

22 1972 Mass. Adv. Sh. at 635, 280 N.E.2d at 673.

23 Id. at 636, 280 N.E.2d at 673.

24 G.L., c. 214, §§19-28.

25 G.L., c. 214, §§22. The factors which may be considered in fixing the amount of a surety bond are enumerated in Damaskos v. Board of Appeal, note 20, *supra*.

26 1972 Mass. Adv. Sh. at 638, 280 N.E.2d at 674. Plaintiffs also maintained that there were " 'no conditions especially affecting the locus, but not affecting generally the zoning district in which it is situated, which would make the literal enforcement of the provisions of the [Boston] Zoning Code a hardship upon the locus or the . . . Faulkner Hospital.' " A literal enforcement of the zoning code would require that a subdivision for residential housing be constructed on the locus. 1972 Mass. Adv. Sh. at 637, 280 N.E.2d at 674.

"The fears of neighbors as to property values and traffic congestion, where the evidence is conflicting on these points, cannot override the health needs of the larger community."[27] This opinion reflects the same special balancing of public and private interests which was noted above in discussion of *Kelloway* and the Court's deference to *public* interest in both cases should be carefully noted for future reference.

[27] 1972 Mass. Adv. Sh. at 639, 280 N.E.2d at 675-76.